

UNITED STATES
v.
AIKEN BUILDERS PRODUCTS

IBLA 94-5

Decided June 23, 1999

Appeal from a decision of Administrative Law Judge Harvey C. Sweitzer, declaring the Red Beauty Nos. 1, 2, 3, and the Valco Nos. 1 and 2 placer mining claims void and denying patent application therefor. Contest Number CA 6490-A.

Affirmed.

1. Mining Claims: Common Varieties of Minerals: Generally--Mining Claims: Determination of Validity--Mining Claims: Discovery: Marketability--Surface Resources Act: Generally

A valid mining claim requires discovery of a valuable mineral deposit. The prudent man standard has been refined by the marketability standard, requiring a showing for a claim located for a common variety of volcanic cinders withdrawn from location by the Act of July 23, 1955, 30 U.S.C. § 611 (1994), of a reasonable expectation that the mineral deposit could be extracted, removed, and marketed at a profit as of July 23, 1955.

2. Mining Claims: Common Varieties of Minerals: Generally--Mining Claims: Determination of Validity--Mining Claims: Discovery: Marketability--Surface Resources Act: Generally

Once a prima facie case of the invalidity of a mining claim has been established, the burden is shifted to the claimant to overcome that case by a preponderance of the evidence. In the absence of evidence of sales prior to July 23, 1955, of a common variety deposit of cinders, a discovery must be established on the basis of evidence of marketability at that time, i.e., that the deposit could have been mined, removed, and marketed at a profit. Evidence of the mere existence of a market is insufficient in the absence of evidence of

a reasonable expectation that the cinders could be marketed at a price in excess of the cost of extracting, removing, and marketing the cinders. Where the evidence discloses that a substantial capital investment in roads and screening/sorting equipment was required to establish a commercially viable operation and that a prudent man would not have made such an investment at that time, a finding of invalidity will be affirmed.

APPEARANCES: C.L. Farrell, Esq., San Bernardino, California, for appellant; Burton J. Stanley, Esq., Assistant Regional Solicitor, U.S. Department of the Interior, Sacramento, California, for appellee.

OPINION BY ADMINISTRATIVE JUDGE GRANT

Aiken Builders Products (Aiken or ABP), a partnership, brings this appeal from a decision dated September 16, 1993, by Administrative Law Judge Harvey C. Sweitzer (Contest Number CA 6490-A), declaring appellant's Red Beauty Nos. 1, 2, 3, and Valco Nos. 1 and 2 placer mining claims, CA MC-30806 through CA MC-30810, null and void for lack of discovery of a valuable mineral deposit. The decision also rejected appellant's patent application for the claims, CA 6490, because the claims were ruled void.

Located for volcanic cinders, these claims include approximately 102 acres in secs. 5, 6, and 8, T. 13 N., R. 12 E., San Bernardino Meridian, California. The Valco 1 and 2 claims were located on September 21, 1954, and the Red Beauty 1, 2, and 3 claims were located May 19, 1955. ^{1/} Shortly afterward, further locations of claims for cinders or other common varieties of minerals were precluded by the Act of July 23, 1955 (the Common Varieties Act), as amended, 30 U.S.C. § 611 (1994).

On October 1, 1979, Denzel Aiken filed an application for patent for these five claims on behalf of Aiken. In response to the patent application, the Bureau of Land Management (BLM) examined these claims and then brought a mining claim validity contest (CA 6490) on February 18, 1982.

The 1982 mining claim contest, CA 6490, was the first of two contests, the second of which, CA 6490-A, is now before us on appeal. In the first contest, BLM charged that the "mineral material present cannot be marketed at a profit now and/or could not be marketed at a profit prior to the Act of July 23, 1955." After a hearing in 1983, Administrative Law Judge E. Kendall Clarke issued a decision on October 4, 1984, declaring appellant's claims null and void. After noting that the claims were

^{1/} Sylvia Bell located the Valco Nos. 1 and 2 claims together with her husband, O.D. Bell. The Bells and Irvin D. Paul located the Red Beauty Nos. 1, 2, and 3 claims. Paul conveyed his interest to Vera Love by quitclaim deed dated Nov. 2, 1960. The Bells and Vera Love conveyed the five claims to Aiken Builders Products on Nov. 16, 1961. (Ex. S, Appendix II.)

located for volcanic cinders and that deposits of common varieties of that mineral were no longer locatable after passage of the Act of July 23, 1955, Judge Clarke found appellant had not shown this mineral could have been extracted, removed, and marketed from the contested claims at a profit in 1955 in satisfaction of the "marketability test" set forth in United States v. Coleman, 390 U.S. 599 (1968).

Aiken challenged this finding in an appeal to this Board. In reviewing the Administrative Law Judge's decision, we conducted a thorough review of the record. We held that:

The critical issue * * * is whether appellant has overcome the prima facie case and shown, by a preponderance of the evidence, that the mineral deposit on the claims could have been extracted, removed, and marketed at a profit as of July 23, 1955, when deposits of common varieties of volcanic cinders became no longer locatable. Section 3 of the Surface Resources Act of July 23, 1955, 30 U.S.C. § 611 (19[94]), declared deposits of common varieties 2/ of cinders and certain other materials shall not be deemed a valuable mineral deposit within the meaning of the mining laws. Hence, in order for a mining claim for such a mineral deposit to be validated, the prudent man-marketability test of a discovery of a valuable mineral deposit must have been met at the time of the Act. Barrows v. Hickel, 447 F.2d 80, 82 (9th Cir. 1971); United States v. Martinez, 49 IBLA 360, 366, 87 I.D. 386, 389 (1980).

[1] In order to support a discovery of a valuable mineral deposit, the evidence must disclose a discovery of a deposit such that a man of ordinary prudence would be justified in the further expenditure of his labor and means with a reasonable prospect of success in developing a valuable mine. Castle v. Womble, 19 L.D. 455, 457 (1894). As the Supreme Court recognized in United States v. Coleman, *supra* at 602, the purpose of the mining law is to reward and encourage discovery of minerals which are valuable in an economic sense--minerals which no prudent man would extract because there is no demand for them at a price higher than the cost of extraction and transportation are not economically valuable. Hence, the marketability test, *i.e.*, whether the mineral deposit can be mined, removed, and marketed at a profit, has emerged as the logical complement to the prudent man test. Id. at 602.

2/ Appellant also suggests it is not required to establish the discovery of a valuable mineral deposit prior to July 23, 1955, because the cinder is not a common variety under section 3 of the Common Varieties Act, 30 U.S.C. § 611 (19[94]), where it has a "property giving it [a] distinct and special value" (Brief at 9). However, appellant presented no evidence in support of this contention. See Tr. I at 195-97.

United States v. Aiken Builders Products, 95 IBLA 55, 57-58 (1986).

In analyzing the evidence presented, we found that:

Sylvia Bell, co-locator of the claims, testified she allowed Roy King to enter the claims in 1955 with a loader and a truck to remove cinders. (Tr. II at 14). Bell also allowed others to remove cinders without charge in order to meet the annual assessment work requirements. (Tr. II at 15-16). Further, she stated that she never made any money from the claims until she sold them to Aiken (Tr. II at 16), although she acknowledged that King sold some cinders from the claims with her permission in late 1954 and 1955. (Tr. II at 26). Bell also testified that there was no screening plant or machinery on the claims in the 1950's. (Tr. II at 22). Jack DelFante, who leased the claims from Bell, said he set up a screening plant on the cinder cone in 1960 which he sold to the Aikens in 1961. (Tr. II at 53). Denzel Aiken testified to acquiring a couple of dump truck loads of cinders from the Bell claims in 1954. (Tr. I at 340). His affidavit states that appellant has been purchasing cinders from the mining claims since approximately 1958 or 1959. (Exh. F-1).

Although appellant had figures for recorded production from the claims from 1966 to 1982 (Tr. I at 166), records of earlier production from the pits were destroyed. Mineral Economics Corporation, a firm owned by appellant's expert, Tognoni, compared the volume of the cinder cone in 1953 as measured from a topographic map with the volume of the cone in 1982 as measured from plotting the topographic contours of the cone at that time. (Tr. I at 161-165). Comparing the volume at the two dates to arrive at an estimate of production for the intervening period, actual production for the years 1966 to 1982 was subtracted out to arrive at an estimated production for the years 1954 to 1965 (Tr. I at 166-67). However, Tognoni was unable to explain the basis for allocating production to the years 1954 and 1955 other than by "drawing a curve." (Tr. I at 167, 218-20). Thus, we find no error in the Administrative Law Judge's conclusion that the testimony of Tognoni as to production prior to July 23, 1955, was speculative and not persuasive in light of the testimony of Bell and DelFante. ^{3/} Based on the record, it is clear that although some isolated sales of cinders were made prior to July 23, 1955, no income was realized by the claim holders and no commercially viable marketing of cinders from the claims had been accomplished.

^{3/} It is true that appellant presented certain hypothetical evidence attempting to establish both actual sales and potential sales during the critical period. Judge Clarke characterized the Tognoni market survey, when analyzed in light of

the testimony of various witnesses, as "full of inconsistencies and contradictions." (Dec. at 8). With respect to the costs of extraction and marketing, Judge Clarke noted that the inquiries by the Government "met with obfuscating and evasive responses." (Dec. at 11). It is clear that Judge Clarke, who as the trier-of-fact had an opportunity to observe the demeanor of appellant's witnesses as they testified, found them noncredible on questions critical to the resolution of this appeal. As we noted in United States v. Chartrand, 11 IBLA 194, 80 I.D. 408 (1973), the Department traditionally affords considerable weight to the findings of the trier-of-fact and where resolution of a case depends primarily upon his findings of credibility, his findings will not be lightly set aside. Id. at 212, 80 I.D. at 417-18. No justification appears of record for ignoring Judge Clarke's clear findings that the testimony for appellant as to marketability was simply not believable.

95 IBLA at 58-59.

Recognizing that actual sales of cinders need not be shown to establish the marketability of cinders from the claims, we further analyzed the evidence of the marketability of cinders from the claim as of July 23, 1955:

Appellant contends it overcame the Government's prima facie case by a preponderance of the evidence. Appellant argues there was a market for the cinders from its claims prior to July 23, 1955, with the two principal buyers being Cind-R-Lite, which had originally supplied ABP, and ABP, and that a certain amount of purchases were made from appellant's claims at that time. Appellant states that there was a "booming outlet for [the] profitable disposal of a substantial quantity of cinders prior to July 23, 1955, in the Las Vegas market." (Brief at 9). The production of cinder in the "Cima area" of California and sales to buyers in Las Vegas had been overlooked by the Government mineral examiner, and, based on appellant's evidence, Judge Clarke concluded that "[o]n July 23, 1955, there was, ostensibly, a market for cinders." (Decision at 11). We agree. Indeed, there was testimony by Russell Aiken that ABP alone was using 80,000 pounds of cinder per day in its manufacturing operations between 1955 and 1957. (Tr. I at 428). Moreover, a substantial market had been in existence since at least 1947. (Tr. I at 74, 329-31; see also Tr. I at 105-08, 119-20). The existence of a market is not negated by the fact that ABP was at such times purchasing, for the most part, from Emerson Ray's "Cima pit" operations (Tr. I at 339; Exh. 4 at 26), in the absence of evidence that the market was closed to competition. United States v. Gibbs, [13 IBLA 382 (1973)] at 392-93. However, as Judge Clarke further stated, "the bare existence of a market is not sufficient to satisfy the marketability test" (Decision at 11).

The major shortcoming in appellant's case is the failure to establish by a preponderance of the evidence that the cinder on appellant's claims could have been extracted, removed, and marketed at a profit prior to July 23, 1955, given the capital investment required to commence production in quantity. See In re Pacific Coast Molybdenum Co., 75 IBLA 16, 90 I.D. 352 (1983).

As the Administrative Law Judge found, appellant presented no evidence of the cost of extracting and processing the cinders so they could be marketed successfully as of July 23, 1955. (Decision at 11).

Indeed, Tognoni, appellant's expert witness, qualified his conclusion that the cinders from appellant's claims could have been marketed at a profit in the Las Vegas market on the condition the claimant would have had to put in "the size roads he needed and the size screening operation he needed to get to that market." (Tr. I at 303; see also Tr. I at 307). Tognoni acknowledged that appellant's predecessors in interest could not have made a profit with the facilities they had in place on July 23, 1955. (Tr. I at 307). Russ Aiken testified that an estimated \$300,000 was invested by ABP in capital improvements since 1961 when they took over the operation and that the "capital improvements always reduced the cost per ton of cinders." (Tr. I at 432). Denzel Aiken testified that although he liked the quality of the cinders he had obtained from the Bell claims in 1954, he was concerned about whether Bell could supply him with the quantity of cinders he needed at his manufacturing plant. (Tr. I at 341). He explained that Bell hadn't "fully mechanized his operation to take care of us" in terms of providing both sufficient quantity and adequate screening of the cinders for size. (Tr. I at 341-342). Thus, it is clear that substantial capital investment in the claims in terms of road improvement and screening/sorting equipment was necessary to mine, process, and market cinders in the quantity required to establish a profitable operation.

The evidence fails to establish that the market for cinders in 1955 was sufficient to justify the capital investment required to market the cinders. The record shows Denzel Aiken was approached by the Bells prior to 1955 with an offer to sell the mine to him. (Tr. I at 358; Exh. F-1). However, despite the fact Aiken had the need for cinders for his own cinderblock manufacturing operation, he turned them down because at the time he "didn't think [he] should get into the mining business." (Tr. I at 358). Although Bell, owner of the claims in 1954 and 1955, talked of trying to get a loan from a bank to develop a full-time mining operation (Tr. II at 36), she had to give cinders away in order to get assessment work performed. (Tr. II at 16, 19). Accordingly, we must affirm the decision of the

Administrative Law Judge that appellant has failed to show discovery of a mineral deposit which could be mined, removed, and marketed at a profit as of July 23, 1955.

95 IBLA at 59-60.

Subsequently, reconsideration of our decision was requested by the Director, Office of Hearings and Appeals, on behalf of the Secretary of the Interior in view of the points raised in a March 11, 1987, letter of counsel for Aiken to the Secretary of the Interior with supporting memorandum and appendix. In support of reconsideration, Aiken asserted that the decision was based on a mistake of fact regarding the lack of a market for cinders in Las Vegas, noting the sale of cinders from the Cind-R-Lite claims to Aiken prior to 1955. Further, Aiken argued that despite the absence of evidence in the record that the cinders from its claims could be extracted, removed, and marketed at a profit as of 1955, it could be concluded from the record that such a market existed in 1955 as would cause a prudent man to invest his time and money with a reasonable prospect of success in developing a valuable mine.

Subsequent to receipt of the request for reconsideration, counsel for BLM requested the Board to vacate its decision and remand the case to BLM for further consideration of the patent application. Counsel contended that there were flaws in the BLM mineral report, particularly concerning its failure to consider the Las Vegas market for cinders. Further, BLM asserted that the report was so flawed as to adversely affect the contestee's ability to respond.

In our decision on reconsideration, we noted that the Board had recognized the existence of a market for cinders in Las Vegas in 1955. We found, however, that this evidence was not sufficient to overcome the Government's case on the question of marketability--whether the cinders from the claims can be extracted, removed, and marketed at a profit--and not simply whether a market existed. United States v. Aiken Builders Products (On Reconsideration), 102 IBLA 70, 74 (1988). Thus, we held that:

Contrary to petitioner's assertion, we find sound authority, as noted in our decision, 95 IBLA at 59, for the principle that in determining the validity of a location for a common variety mineral made prior to July 23, 1955, where evidence is lacking of pre-1955 sales, the costs of extraction, preparation, and transportation, as well as the level of the then-existent market, should be considered. Rawls v. United States, 566 F.2d 1373, 1376 (9th Cir. 1978); United States v. Gibbs, *supra* at 391. We carefully reviewed and analyzed the record in this case regarding the sale of cinders from these claims prior to 1955 in our decision and concluded: "Based on the record, it is clear that although some isolated sales of cinders were made prior to July 23, 1955, no income was realized by the claim holders and no commercially viable marketing of the cinders from the claims had been accomplished." 95 IBLA at 58.

It is clear from the record, including the testimony of Hale Tognoni, Aiken's expert, that the cinders from the claims could not have been marketed at a profit in the Las Vegas market without installation of substantial improvements on the claims including roads and screening/sorting equipment. 95 IBLA at 59-60. Upon analysis of the record, the Board found that the evidence failed to establish that "the market for cinders in 1955 was sufficient to justify the capital investment required to market the cinders" from these claims. 95 IBLA at 60. We noted that Denzel Aiken was approached by the Bells prior to 1955 with an offer to sell the mine which he declined despite his own need for cinders in his cinderblock manufacturing operation. Petitioner discounts the relevance of this testimony in light of his statement that he "didn't think [he] should get into the mining business" (Tr. I at 358), asserting that the proper standard is an objective test. Petitioner asserts that a prudent miner would have made the investment. However, we find this does not make his testimony any less probative on the question of whether a prudent miner would invest in development of the claims, *i.e.*, whether the cinders could be mined, removed, and marketed at a profit as of July 23, 1955. Denzel Aiken's firm represented one of the principal components of the potential Las Vegas market for these cinders and his supply from Cind-R-Lite had been previously cut off, yet he turned down an offer to acquire these claims prior to 1955. We note that his opinion regarding the desirability of investing in the claims obviously changed sometime after 1955.

Further, contrary to petitioner's contention, we cannot discount the testimony of Sylvia Bell, who tried to develop the claims but was unable to develop them prior to 1955. We reject Aiken's contention her testimony is to be ignored because she somehow lacked the entrepreneurial skills or financial know-how to develop the claims. The evidence simply does not support a conclusion that a reasonably prudent miner would have been justified as of July 23, 1955, in making the investment in capital improvements necessary to extract and market the cinders from these claims. While we recognize that neither the lack of development prior to 1955 nor the need for investment in capital improvements is a bar to validity, we find this evidence distinguishes this case from United States v. Harenburg, [9 IBLA 77 (1973)], cited by petitioner.

102 IBLA at 74-75. Accordingly, we held that no basis had been shown to alter our decision in the case and, hence, reaffirmed our prior decision on reconsideration. 102 IBLA at 75.

Thereafter, on September 16, 1988, the Secretary of the Interior granted a request filed by appellant and assumed jurisdiction of the case, pursuant to 43 C.F.R. § 4.5(c). Subsequently, on January 31, 1989, the

Acting Secretary of the Interior vacated the decisions of the Board in United States v. Aiken Builders Products, *supra*, and United States v. Aiken Builders Products (On Reconsideration), *supra*, and the decision of Administrative Law Judge Clarke in Contest CA 6490. The decision of the Acting Secretary directed BLM to conduct a de novo assessment of the validity of these claims in order to ascertain whether they should be patented pursuant to Aiken's mineral patent application.

Appellant's mining claims were reexamined by BLM Mineral Examiner Robert M. Waiwood, of the California Desert District Office. He examined the evidence gathered in the first contest, conducted his own survey of market conditions in July 23, 1955, and assembled a new mineral report summarizing his findings. (Ex. S.) A new contest complaint, CA 6490-A, was brought by BLM on October 18, 1990. This complaint charged:

A. Valuable minerals have not been found within the limits of the claims so as to constitute a valid discovery within the meaning of the mining laws.

B. Material found within the limits of the claims is not a valuable locatable mineral deposit under Section 3 of the Act of July 23, 1955, (69 Stat. 367; 30 U.S.C. 601).

C. No discovery of a valuable mineral has been made within the limits of the Red Beauty Nos. 1, 2 and 3, and Valco Nos. 1 and 2 placer mining claims in mineral patent application CA 6490 because the mineral material was not actually or prospectively marketable prior to the Act of July 23, 1955.

(Contest Complaint at 2.)

Administrative Law Judge Sweitzer held a hearing on January 26-28, 1993, and issued the September 16, 1993, decision on appeal here. He found, based on all evidence from the hearing record, that BLM established a prima facie case of invalidity of the claims based on testimony that the claims could not be mined at a profit prior to July 23, 1955. He reached this conclusion after consideration of testimony and evidence from both hearings, as testimony and evidence from the previous hearing was reintroduced at the second hearing. (Tr. III at 9-10.) ^{2/} He further found

^{2/} The record of the hearings in this case consists of several transcript volumes. The hearings in the first contest proceeding encompassed two separate venues. The transcript of testimony taken on Jan. 19-21, 1983, in San Bernardino, California, is identified as Tr. I (comprising volumes I through III), while the transcript of testimony taken on Feb. 28, 1983, in Las Vegas, Nevada, is separately paginated and is referred to as Tr. II (comprising volume IV). The transcript of the hearing in the second contest held in San Bernardino on Jan. 26-28, 1993, is also separately paginated and is identified as Tr. III (consisting of volumes V through VII). For the sake of clarity, transcript citations are identified as Tr. I, II, or III, followed by the page citation.

that appellant did not overcome the Government's prima facie case. He pointedly applied the analysis the Board outlined in the Aiken decisions because:

While the Board's decisions in this matter were vacated by the Memorandum Decision of the Secretary of the Interior, much of the Board's analysis of the evidence and law is still applicable because (1) the record of the previous hearing was incorporated into the record of the latest hearing, (2) at the latest hearing, Aiken failed to cure the fatal flaw in its case, the lack of evidence that the cinders could be extracted and marketed at a profit as of July 23, 1955, and (3) the Secretary, in his Memorandum Decision, did not find fault with the Board's analysis of the evidence and law.

(Decision at 8.) Administrative Law Judge Sweitzer emphasized that appellant's showing that cinders could be marketed prior to July 23, 1955, did not meet its obligation to show that cinders from these claims could have been marketed at a profit prior to July 23, 1955, in view of the capital improvement expenses and other mining costs that would have been necessary to enter the market that existed at that time. Id. at 10-11.

On appeal to this Board, appellant asserts that there was a discovery on these claims as of July 23, 1955. Appellant challenges the Government prima facie case of invalidity on the ground that the evidence relied upon is speculative. Contending that the dispositive issue is whether cinders from the claims could have been marketed at a profit in 1955, appellant argues that the Administrative Law Judge improperly applied the "prudent man" and "marketability" tests and misinterpreted the evidence presented as to the extent of the market in 1955, the extent of development at that time, and the costs of developing the claims. In particular, appellant cites the testimony of Sylvia Bell regarding claimants' investment in road building efforts from 1954 to 1960 and her statement that she could have marketed cinders from the claims in 1954 at a profit. In support of the validity of the claims, appellant also notes that Aiken bought some cinders from the claims in 1954-55, using existing roads.

Counsel for BLM responds that Administrative Law Judge Sweitzer was correct in finding that the augmented record compels the same conclusion of invalidity reached by both Administrative Law Judges and previously by this Board. Conceding the existence of a market for cinders in Las Vegas, BLM cites the testimony of appellant's expert witness, Hale Tognoni, acknowledging that development work would be required to get cinders to market, and the testimony of BLM geologist Bob Waiwood that the costs of developing the deposit in 1955 to permit extraction of cinders would have put the claims at a competitive disadvantage in the market. Additionally, BLM cites the evidence that given the relatively simple type of mining and processing operation involved in common variety cinders, a mining claimant would, if he profitably could, enter into production and

sales shortly after discovery when there is an available market. Further, BLM asserts that there is no evidence "that production in any quantity occurred on the subject claims prior to 1960."

The issue in this case remains whether the cinder deposit on these claims was marketable prior to July 23, 1955. After a thorough review of the augmented record in this appeal, this Board concludes that it was not.

Through testimony at the 1993 rehearing, BLM reconfirmed the prima facie case of the invalidity of the claims on the basis of lack of marketability. Bob Waiwood, BLM geologist, testified that he talked with various jobbers in the area and people such as Bill Mann who marketed cinders produced from the area, including the Cima property, prior to 1955. Inquiries were also made to principals at the Cima property. Waiwood's research disclosed that the market was being satisfied prior to 1961 by Cima production. (Tr. III at 47-48, 50-51, 69-70, 74.) Factors considered in his marketability determination included the cost of necessary capital improvements, noting that Aiken reported \$22,000 in capital improvements on the claims in their notices of assessment work to bring the claims into production after 1961. (Tr. III at 75.) In particular, Waiwood testified to the need for improved roads to handle heavy trucks and additional equipment such as a screening plant to separate cinders by size in concluding that cinders from the claims could not be marketed at a profit in July 1955. (Tr. III at 77.) With respect to the development of a cinder mining operation, Waiwood stated that in his experience, if a market existed, operations would begin almost immediately (within 2 to 3 months) in order to avoid losing the market. (Tr. III at 138-39.) He concluded that the cinder deposits on these claims were not marketable based on the "[l]ack of diligent development on the property, lack of an open market that could be identified during the period that wasn't already being satisfied or could be satisfied cheaper from mainly the Cima operation." (Tr. III at 157-58.)

James R. Evans, BLM mineral examiner, testified that he explored the area as a graduate student in 1956. (Tr. III at 188.) He stated that the access road to the contested claims shown on Ex. K (but not shown on Ex. R) did not exist in 1956 and that the existing road ended at the water tank identified on those exhibits as water tank #3 to the south and east of the Cima operation, although he did acknowledge a "very poor" and "unsafe" road extending a quarter mile toward the claims and ending in a dry wash. (Tr. III at 193-95.)

Contestee's case at the rehearing was based on the testimony of Paul K. Morton, an economic geologist. He prepared a marketability report on the contested claims during the period from the 1950's to 1960. (Ex. 29.) Morton concluded that the contested claims met the marketability standard as of July 1955. (Tr. III at 283.) He relied upon evidence from the prior hearing, including the Tognoni report in preparing his analysis.

(Tr. III at 242, 262.) Morton based his opinion that a reasonably prudent person would be justified in the further expenditure of his labor and money with a reasonable prospect of developing a paying mine, in part, on the

upward production curve for cinders after World War II and the increasing demand from the construction industry at the time. (Tr. III at 249-50.) He acknowledged, however, that if the Bells had started production on the contested claims while Aiken was being supplied by Cima, the price for cinders would have declined. (Tr. III at 280-81.)

[1] A mining claim is valid only if it is supported by a discovery of a valuable mineral deposit. A discovery exists "where minerals have been found and the evidence is of such a character that a person of ordinary prudence would be justified in the further expenditure of his labor and means with a reasonable prospect of success in developing a valuable mine." Castle v. Womble, *supra* at 457. This test has been refined to require a showing of marketability, that a claimant has a reasonable expectation that the mineral could be extracted, removed, and marketed at a profit. United States v. Coleman, *supra*. As we have held in our prior decisions in this case, this is the dispositive issue in this case. These claims were located for volcanic cinders, a common variety mineral which could no longer be located under the mining laws after passage of the Act of July 23, 1955, 30 U.S.C. § 611 (1994). For common variety mineral claims located before passage of the Act, the prudent person/marketability test for discovery of a valuable mineral must have been met at the date of the Act, July 23, 1955. Barrows v. Hickel, *supra* at 82 (where the court upheld a finding that sand and gravel deposits were not valuable in 1955 as local demand did not exist until 1960).

Based on the evidence introduced in this case, including that presented at the 1993 rehearing, we must conclude that the Government presented a prima facie case of lack of marketability of the cinder deposits in July 1955. The testimony of the Government's witness at the first hearing, Joe Rudys, that a prudent man would not have tried to mine this deposit in 1955 was based in part on his conversations with and information obtained from Vera Love, a predecessor-in-interest of the contestee, Denzel Aiken, a principal of the contestee, and Warren Mecham, mine supervisor for the contestee. 95 IBLA at 57. This prima facie case was reconfirmed at the rehearing. Waiwood testified that the existing market was satisfied prior to 1961 by Cima production and the cost of capital improvements required to market the cinders on the contested claims in any quantity in 1955, including costs of road construction for heavy trucks and a screening plant to sort cinders by size, precluded marketing the cinders at a profit in July 1955. (Tr. III at 75, 77, 157-58.) Without more, the above testimony was clearly adequate to support the Government's assertion that the cinders from the claims were not marketable as of July 23, 1955.

[2] Once a prima facie case has been established, the burden shifts to the contestee to overcome that case by a preponderance of the evidence. Hallenbeck v. Kleppe, 590 F.2d 852, 856 (10th Cir. 1979); United States v. Zweifel, 508 F.2d 1150, 1157 (10th Cir. 1975), *cert. denied*, 423 U.S. 829 (1976); United States v. Springer, 491 F.2d 239, 242 (9th Cir. 1974), *cert. denied*, 419 U.S. 834 (1974); United States v. Husman, 81 IBLA 271, 275

(1984). Contestee relied upon the testimony of its economic geologist, Morton. His conclusion as to the marketability of cinders from the claims in July 1955 was based in part on the Tognoni report introduced into evidence in the prior hearing. (Tr. III at 261-62.) However, as we noted previously, the estimate by Tognoni of cinder production from the contested claims was seriously flawed in that he had no basis for allocating production for the years prior to 1966 and, in particular, for allocating estimated production for 1954 and 1955. 95 IBLA at 58. A screening plant was not installed on the claims until 1960, by Jack DelFante, lessee in 1960-61. (Tr. II at 53.) DelFante testified that he was unaware of commercial production from the claims before 1960, although some cinders had been removed from the Red Beauty No. 1. (Tr. II at 57.)

In the absence of any evidence of any substantial commercial sales of cinders by July 1955, the major shortcoming in appellant's case remains the failure to establish by a preponderance of the evidence that the cinder on appellant's claims could have been extracted, removed, and marketed at a profit prior to July 23, 1955, given the capital investment required to commence production in quantity. See United States v. Gibbs, *supra* at 391.

As we found previously, Tognoni, appellant's expert witness, qualified his conclusion that the cinders from appellant's claims could have been marketed at a profit in the Las Vegas market on the condition the claimant would have had to put in "the size roads he needed and the size screening operation he needed to get to that market." (Tr. I at 303, 307.) Tognoni acknowledged that appellant's predecessors-in-interest could not have made a profit with the facilities they had in place on July 23, 1955. (Tr. I at 307.) Russ Aiken testified that an estimated \$300,000 was invested by ABP in capital improvements since 1961 when they took over the operation and that the "capital improvements always reduced the cost per ton of cinders." (Tr. I at 432.) Denzel Aiken testified that, although he liked the quality of the cinders he had obtained from the Bell claims in 1954, he was concerned about whether Bell could supply him with the quantity of cinders he needed at his manufacturing plant. (Tr. I at 341.) He explained that Bell had not "fully mechanized his operation to take care of us" in terms of providing both sufficient quantity and adequate screening of the cinders for size. (Tr. I at 341-42.) Testimony at the rehearing from Waiwood and from Evans confirmed that substantial capital expenditures for road work and for equipment were required to bring the property into production. (Tr. III at 75, 77, 193-94.) Thus, it is clear that substantial capital investment in the claims in terms of road improvement and screening/sorting equipment was necessary to mine, process, and market cinders in the quantity required to establish a profitable operation. While appellant's witness Morton did not believe the cinder market was closed to entry in 1955, he acknowledged that, if the Bells had started production on the contested claims while Aiken was being supplied by Cima, the price for cinders would have declined. (Tr. III at 280-81.) Accordingly, in the absence of evidence that cinders from the contested claims could be extracted, removed, and marketed at a profit prior to July 23, 1955, we find that appellant has failed to overcome the Government's prima facie case.

Therefore, pursuant to the authority delegated to the Board of Land Appeals by the Secretary of the Interior, 43 C.F.R. § 4.1, the decision of Administrative Law Judge Harvey C. Sweitzer in Contest Number CA 6490-A, declaring the Red Beauty Nos. 1, 2, 3, and the Valco Nos. 1 and 2 placer mining claims void and denying the patent application CA 6490, is affirmed.

C. Randall Grant, Jr.
Administrative Judge

I concur:

James L. Burski
Administrative Judge